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IN THE

Supreme Court of the United States

October Term, 1962.

No. [redacted] 165

JOHN P. GLASS, JR.,
Petitioner,

v.

BENDIX AVIATION CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1137.

JOHN P. GLASS, JR.,

Petitioner,

v.

BENDIX AVIATION CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

Did the District Court abuse its discretion under Rule 41(b) and (c) of the Federal Rules of Civil Procedure by dismissing petitioner's counterclaim for want of prosecution?

RULE INVOLVED.

Of the constitutional provisions and various rules cited in the Petition at pages 5-7, only Rule 41(b) of the Federal Rules of Civil Procedure is pertinent. Rule 41(c) makes Rule 41 applicable to the dismissal of a counterclaim.

STATEMENT OF THE CASE.

Petitioner seeks review of the Court of Appeals' *per curiam* affirmance (81a) of a judgment (79a) for respondent Bendix Aviation Corporation dismissing a counterclaim under Rule 41(b) and (c) of the Federal Rules of Civil Procedure for failure of the petitioner John P. Glass, Jr. to prosecute his counterclaim, the only claim which has been asserted in this action for over 11 years.

Apart from requesting an extension of time in which to file a brief and participating in the proceedings relating to dismissal of the counterclaim for his failure to prosecute it, Glass has done nothing in the case for more than 10 years.[1]

On June 4, 1948, more than 15 years ago, Bendix filed a complaint to compel Glass to execute the necessary papers to permit Bendix to file a patent application on an invention, the title to which was claimed by Bendix (28a). Glass filed a counterclaim, seeking compensation from Bendix for the claimed breach of an alleged oral "understanding and implied agreement" to which Bendix filed a reply denying the existence of any such agreement.

Glass' counterclaim related to matters alleged to have occurred in the course of his employment with Bendix from April 30, 1941 until October 19, 1945, seventeen to twenty-two years ago (28a, 32a). The proof on the issues raised by the counterclaim would have consisted largely of oral testimony. A number of persons having knowledge of relevant facts are no longer in the employ of Bendix and the whereabouts of some are unknown (32a).

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1. In the Court of Appeals Glass contended that his praecipe, filed February 6, 1958, ordering the case on the trial list and his answer of the call of the trial list on January 16, 1959 were independent of the proceedings relating to his failure to prosecute. The District Court had found that Glass was "impelled" to order the case on the trial list by a notice from the Clerk that the case was about to be dismissed (83a). The Court of Appeals affirmed without mention of Glass' contention.

For the past 11 years, from February 19, 1952 to date, the sole claim which has been asserted in the action has been that alleged in the counterclaim (28a).[2]

On April 16, 1953 the District Court (Kirkpatrick, C. J.) entered an order (1b) granting a motion by Bendix for leave to amend its reply to the counterclaim. Glass had opposed the motion to amend and had stated that if granted, he would be required to take further depositions (29a). Accordingly, the order of April 16, 1953 was conditioned upon the payment by Bendix to Glass of certain expenses of the latter ". . . incident to the taking of so much of any further depositions on behalf of John P. Glass, Jr. as may be necessitated by the amendment permitted by this order" (1b).

Following the order dated April 16, 1953, no depositions were noticed or taken on behalf of Glass and no other action or proceeding was taken by Glass (6a-7a), except to advise the Clerk shortly before August 27, 1953 that the case was "not ready for trial" (83a).

After the case had been dormant for over four years, the Clerk, on January 27, 1958 sent the parties a notice (2b-3b) pursuant to Local Rule 18, stating that unless application was made to the court within two weeks, the case would be deemed abandoned and stand dismissed, in response to which Glass filed an application (4b) asking that the counterclaim be not deemed abandoned (29a).

Thereafter, Bendix filed a motion (5b) to dismiss the counterclaim under Rule 41(b) and (c) for failure to prosecute (30a).

On July 22, 1959 the District Court (Kirkpatrick, C. J.) filed an Opinion (82a-85a), reported at 176 F. Supp. 374,

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2. On May 7, 1951 the District Court (Kirkpatrick, C. J.) granted Glass' motion to dismiss the complaint on the ground that Bendix had received all that it was requesting by way of specific performance, by reason of actions of Glass subsequent to the commencement of the suit. The order of dismissal was affirmed by the Court of Appeals in an Opinion dated February 19, 1952 which is reported at 195 F. 2d 267, at 272-273.

denying Bendix's motion to dismiss the counterclaim and granting Glass' application that the counterclaim be not deemed abandoned.

In its subsequent Opinion dismissing the counterclaim and on reargument, the District Court observed that it denied Bendix's motion to dismiss in 1959 only because "there was just enough excuse for the counterclaimant's inactivity to allow him another opportunity to prosecute his case . . . ." (75a, 80a).

On August 22, 1961, no proceedings having been docketed in the case for two more years, the Clerk sent a second notice (26a-27a) to counsel pursuant to Local Rule 18 to the effect that unless the Court, upon written application should otherwise order, the action would be dismissed (30a).

On August 29, 1961 Bendix filed a second motion to dismiss the counterclaim under Rule 41(b) and (c) for failure to prosecute (27a).

On September 11, 1961 Glass filed a motion to strike the Clerk's second notice under Local Rule 18 (31a).

On November 7, 1961, after the submission of briefs and an extensive hearing, the District Court (Kirkpatrick, S. J.) filed an Opinion granting Bendix's motion to dismiss the counterclaim for failure to prosecute and, for that reason, found it unnecessary to consider Glass' motion to strike the Clerk's notice under Local Rule 18. In its Opinion (75a-79a) the Court found and reasoned as follows:

> 1. Counsel for Glass was notified on September 1, 1959 that the case had been designated as a "protracted case" and assigned to Judge Kirkpatrick for trial (76a). Since the case had been designated protracted, it did not share in the automatic advance of cases upon the regular trial calendar but arrangements fixing dates for pre-trial and trial were required to be made with the judge to whom the case had been assigned (76a).

2. Glass' counsel was fully aware of the distinction and, moreover, had had it particularly called to his attention by the Clerk in the latter's letter of September 1, 1959 (76a-77a).

3. Counsel for Glass, who stated that his office had been following the civil jury trial list, could not have helped seeing that cases with higher numbers than his were being tried (77a).

4. Counsel for Glass was advised by the Clerk that his case had been assigned to a senior judge who did not sit for the trial of cases on the regular civil jury trial list but took cases on special assignment only (77a).

5. Glass' attorney knew that the case would not be tried until arrangements were made with the judge (77a).

6. Although there was no local rule governing the procedure in a protracted case the practice was well understood, particularly by lawyers with as much familiarity with federal practice as Glass' counsel (77a).

7. Glass' counsel was familiar with Rule 41(b) since he represented the party whose claim was dismissed in *Ordnance Gauge Company v. Jacquard Knitting Machine Co., Inc.*, 265 F. 2d 189 (3d Cir. 1959), cert. den. 361 U. S. 829, and was also counsel in *Timmerman Products, Inc. v. George K. Garrett Company, Inc.*, 22 F. R. D. 56 (E. D. Pa. 1958), in which his adversary escaped dismissal for the reason that his (Glass' counsel in the present case) client was in pari delicto (77a-78a).

8. Neither the court nor Bendix was under any duty to take any steps to bring the case to trial. The responsibility was squarely up to Glass and his attorney (78a).

9. The court was justified in considering the chronology of the case before the 1959 Order in determining whether there was or ever had been any genuine intention to get this case to trial (78a).

10. At the end of September 1960 the Clerk, at the court's direction, inquired of counsel whether or not they would be prepared for trial before January of 1961 and was advised that they would not be.[3] Moreover, counsel for Glass advised the Clerk at that time that he was considering taking further depositions and was not ready for trial on that account. No depositions had been noticed or taken and at the time of argument he advised the court that he then did not intend to take any (79a).

On May 7, 1962 following a hearing on Glass' motion for reargument, the District Court (Kirkpatrick, S. J.) filed a further Opinion (80a) in which it adhered to its original ruling "that this case must be dismissed for want of prosecution," stating (80a):

> "I am satisfied that counsel for the counterclaimant was not aware of the practice of this court followed in the listing for trial of protracted cases, which existed in 1959-1962 and which, at that time, was not embodied in any rule of court. I, therefore, feel that he can be absolved of disregard of an established practice of the court. However, it is still apparent that, with knowledge that his case was not progressing to trial along with other cases listed on the trial calendar, he did nothing to keep it moving and, in fact, when inquiry was made by the Court in September 1959 as to his readiness for trial, stated that he would have to take more depositions—which in fact have never been noticed.

3. These dates are stated in the District Court's Opinion as September 1959 and January 1960. Petitioner concedes that they should be September 1960 and January 1961. Petition p. 15 fn.

"Taking all this in connection with the history of this 14 year old case, it seems to me that what I said in a previous opinion, 'How soon should a party realize that the machinery of the court, which moves cases along for trial, is not working properly and that the trial of his case will in all probability be indefinitely deferred unless he does something about it?', is still fully applicable. The answer in this case is that the counterclaimant has waited too long."

The Court of Appeals affirmed *per curiam* the District Court's judgment dismissing the counterclaim for want of prosecution under Rule 41(b) and (c), "for the reasons so well stated in Senior Judge Kirkpatrick's Opinions of November 7, 1961 and May 7, 1962" (81a).

ARGUMENT.

I. The Decisions Below Involve No Question of Federal Law Not Already Decided by This Court or Upon Which There Is a Conflict Among the Circuits.

Petitioner fails to cite the controlling decision of this Court in *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962). There this Court affirmed a dismissal with prejudice, holding that Rule 41(b) authorizes dismissal for want of prosecution whenever the "circumstances make such action appropriate"; that the District Court's power of dismissal under Rule 41(b) is unlimited; and that the only question for determination by an appellate court is whether the dismissal is an abuse of discretion under the attendant circumstances:[4]

> "Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." (370 U. S. at 633)

In the present case it is plain that the District Court's dismissal of Glass' counterclaim was not an abuse of discretion.

Apart from requesting an extension of time in which to file a brief and participating in proceedings relating to dis-

4. It has likewise been the uniform rule of each of the eleven United States Courts of Appeals that an order of dismissal under Rule 41(b) will not be set aside on appeal unless such dismissal is held to be an abuse of discretion. *Garden Homes, Inc. v. Mason* 249 F. 2d 71 (1st Cir. 1957), cert. den. 356 U. S. 903 (1958); *Demeulenaere v. Rockwell Manufacturing Company*, 312 F. 2d 209 (2d Cir. 1962); *Agronofsky v. Pennsylvania Greyhound Lines*, 248 F. 2d 829 (3d Cir. 1957); *Timmons v. United States*, 194 F. 2d 357 (4th Cir. 1952); *Voliva v. Bennett*, 201 F. 2d 434 (5th Cir. 1953); *Refoir v. Lansing Drop Forge Co.*, 124 F. 2d 440 (6th Cir. 1942); *Jameson v. Du Comb*, 275 F. 2d 293 (7th Cir. 1960); *Partridge v. Saint Louis Joint Stock Loan Bank*, 130 F. 2d 281 (8th Cir. 1942); *Birdsong v. United States*, 262 F. 2d 105 (9th Cir. 1958); *Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825 (10th Cir. 1948); *Barger v. Baltimore & O. R. Co.*, 130 F. 2d 401 (D. C. Cir. 1942).

missal of the counterclaim for his failure to prosecute it, Glass has done nothing in this case since April 16, 1953. The authorities are legion that such a period of inaction is sufficient to justify dismissal under Rule 41(b). Research has not disclosed any reported appellate decision in which the period of inaction has exceeded that involved in the present case. On the contrary, where the alleged failure to prosecute constituted inaction alone, as opposed to failure to proceed at trial, pretrial or to comply with some other order of court, the longest period of inaction found in any reported appellate case was five years and seven months, three years less than the period of total inaction in the present case.[5]

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5. Research has disclosed fifteen appellate cases decided since 1940 involving dismissal for failure to prosecute where the failure to prosecute constituted mere inaction. A table of these cases, in each of which dismissal was affirmed, together with the period of delay involved in each is set forth below.

*Period of Inaction**	*Case*
6 months	*Birdsong v. United States*, 262 F. 2d 105 (9th Cir. 1958)
1 year 3 months	*Salmon v. City of Stuart*, 194 F. 2d 1004 (5th Cir. 1952)
1 year 3 months	*Barger v. Baltimore & O. R. Co.*, 130 F. 2d 401 (D. C. Cir. 1942)
1 year 4 months	*United States v. Bernstein*, 166 F. 2d 466 (5th Cir. 1948)
2 years 1 month	*Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406 (9th Cir. 1940)
2 years 7 months	*Tubman v. Olympia Oil Corp.*, 276 F. 2d 581 (2d Cir. 1960)
2 years 10 months	*Boudreau v. United States*, 250 F. 2d 209 (9th Cir. 1957)
3 years 5 months	*Boling v. United States*, 231 F. 2d 926 (9th Cir. 1956)
3 years 6 months	*Janousek v. Wells*, 303 F. 2d 118 (8th Cir. 1962)

* From date of last affirmative action taken in case until date of dismissal. Where date of last affirmative action does not appear, from date case instituted until date of dismissal.

(Footnote continued on next page)

Proof of prejudice to Bendix was not a prerequisite to the application of Rule 41(b), *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956); *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406 (9th Cir. 1940).

Moreover, as the District Court recognized, Bendix has in fact been prejudiced by the delay. The counterclaim arises out of transactions occurring in the course of Glass' employment with Bendix between 1941 and 1945. Proof by both parties would require oral testimony and a number of persons formerly employed by Bendix having knowledge of the facts are no longer in its employ and the whereabouts of some are unknown (75a).

Glass seems to argue that the decisions of the courts below were based solely on his post 1959 delinquencies. However, it is apparent that the District Court took into consideration the fact that Glass had failed to prosecute his counterclaim for over eight and one-half years, and that the action had been pending for more than thirteen years. Thus, in holding that the denial of the motion to dismiss in July 1959 did not wipe out past history, the District Court stated, "I think that I am fully justified in bearing in mind the chronology of this case before the 1959

3 years	8 months	*Terhune v. Prudential Steamship Corporation*, 283 F. 2d 467 (2d Cir. 1960)
3 years	9 months	*Shotkin v. Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825 (10th Cir. 1948)
4 years	5 months	*Darlington v. Studebaker-Packard Corporation*, 261 F. 2d 903 (7th Cir. 1959), cert. den. 359 U. S. 992
4 years	7 months	*Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956)
5 years	5 months	*Ordnance Gauge Co. v. Jacquard Knitting Machine Co., Inc.*, 265 F. 2d 189 (3d Cir. 1959) cert. den. 361 U. S. 829
5 years	7 months	*Slavitt v. Meader*, 278 F. 2d 276 (D. C. Cir. 1960)
8 years	7 months	GLASS v. BENDIX

order in considering whether there is now or ever has been any genuine intention to get this to trial" (78a).

Furthermore, the District Court properly considered the fact that Glass did nothing affirmatively after July 22, 1959, when the counterclaim was reinstated (82a-85a). By that decision, Glass was clearly put on notice that it was up to him to take active steps towards advancing his counterclaim to trial. Instead, he did nothing until the Clerk's second notice of August 22, 1961 that the case was again subject to dismissal under Local Rule 18. At the argument on October 18, 1961, in commenting on Glass' inaction, Judge Kirkpatrick stated (14b):

> "It is a very different situation from a brand new case. I would feel quite differently about it, but this case had been pending 11 years in 1959, standing 11 years in the court. Now doesn't that at least indicate, when counsel finally get it reinstated after a motion to dismiss, after he gets it made current, and then counsel for whatever reason does nothing for two years more, a disinclination to prosecute the case?"

Thus, the decisions below involve no question of federal law not already decided by this Court or upon which there is a conflict among the Circuits. On the contrary the courts below have decided the question presented in conformity with the controlling decision of this Court and the uniform rulings of the Courts of Appeals.

II. The Reasons Relied Upon by the Petitioner for the Allowance of the Writ Do Not Justify Its Issuance.

A. *The Decisions Below Do Not Deprive Petitioner of His Property Without Due Process of Law.*

Petitioner's first reason in support of the writ is that the dismissal of his counterclaim under Rule 41(b) violates due process. This contention in turn is based on the asser-

tion, that because the District Court's practice with reference to protracted cases was not in writing, counsel for petitioner was not notified adequately of the consequences of his inaction or of the fact that this case would not be tried unless he did something about it.

Again petitioner ignores the governing decision of this Court in *Link v. Wabash Railroad Co.*, 370 U. S. 626 (1962). There this Court sustained a dismissal with prejudice for failure to prosecute under Rule 41(b) against a similar argument that the dismissal violated due process because of lack of notice, saying:[6]

> "Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. * * * The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." (310 U. S. at 632)

Here in addition to the notice afforded by Rule 41(b) of the consequences of failure to prosecute, the District Court found that counsel for Glass had had the experience of representing the party whose claim was dismissed under Rule 41(b) in *Ordnance Gauge Co. v. Jacquard Knitting Machine Co.*, 265 F. 2d 189 (3d Cir. 1959), cert. den. 361 U. S. 829 and was counsel for defendant in *Tinnerman Products, Inc. v. George K. Garrett Company, Inc.*, 22 F. R. D. 56 (E. D. Pa. 1958), where plaintiff escaped dismissal because defendant was in pari delicto in failing to prosecute his counterclaim (77a-78a). Moreover, in the present case counsel for Glass escaped dismissal under Rule 41(b) in 1959 only because as Judge Kirkpatrick stated in both of his subsequent opinions:

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6. In *Link* petitioner also complained of failure to hold an adversary hearing. This element is not present here for petitioner was accorded a hearing and a rehearing on the motion to dismiss.

". . . there was just enough excuse for the counter-claimant's inactivity to allow him another opportunity to prosecute his case . . .". (75a, 80a)

Counsel for Glass not only had general knowledge of the consequences of inaction but also had specific knowledge which would have prompted him to action in this case if he had desired to prosecute it.

The routine progression of cases to trial in the Eastern District of Pennsylvania is governed by the Standing Order of May 2, 1958 (86a-89a), which provides for the automatic advancement of a case to trial as the older cases are disposed of. However, that Standing Order was not in fact being applied to this case because the case had been designated protracted (33a). A protracted case does not share in the automatic advance of cases upon the regular trial calendar, but arrangements fixing dates for pre-trial and trial must be made with the judge to whom the case has been assigned (33a-34a). Consequently, this case did not progress to trial along with other cases listed on the trial calendar.

The District Court found in its Opinion of May 7, 1962 that Glass knew that the case was not progressing to trial along with other cases listed on the trial calendar and should have realized that its trial in all probability would be deferred indefinitely unless he did something about it (80a).[7] In order to reach the due process question sought to be raised by Glass, this Court would be required to overturn these findings. However, they are fully sustained by the evidence.

(1) The Clerk's letter of September 1, 1959 (20a) advised counsel for Glass that the case had been designated as a protracted case and had been assigned to Judge Kirkpatrick for trial. It also informed him that all applica-

7. In the Opinion of November 7, 1961 dismissing the counterclaim, the District Court noted that failure to prosecute includes doing "nothing, knowing that until something is done there will be no trial" (77a).

tions concerning the case should be made to Judge Kirkpatrick and that arrangements for a pretrial conference should be made directly with the judge.

The Standing Order of May 2, 1958 does not provide for the designation of cases as protracted. It makes no provision for the assignment of a case to a particular judge until a case first has been placed on the ready list and thereafter transferred to the pool. This case has never been placed on a ready list or transferred to the pool. The Standing Order of May 2, 1958 does not require that applications be made to a particular judge or that arrangements for a pre-trial conference be made directly with that judge. Therefore, as early as September 4, 1959 counsel for Glass was put on notice that the Standing Order of May 2, 1958 was not being applied to this case.

(2) On June 15, 1960 counsel for Glass received the 1960-61 Civil Jury Trial Calendar (40a). This case appeared as No. 109, was marked protracted, and assigned to Judge Kirkpatrick (22a). Of the total of 662 cases on this list only 11 were marked protracted and assigned to a particular judge. Apparently counsel for Glass then recognized that the case was in a unique category, for on June 17 he had his office manager telephone the Clerk, "to inquire as to when and in what manner this case may be reached for trial" (40a-41a). Her memorandum to the file dated June 17, 1960 stated that she spoke to the Clerk and that "he said Judge Kirkpatrick does not sit on cases on the regular list and if the case is assigned to him the Clerk waits for the Judge to say when he is ready to try the case" (41a). Inasmuch as counsel for Glass inquired and was told that Judge Kirkpatrick does not sit on cases on the regular list he could not have believed that progress of the case was being controlled by the Standing Order of May 2, 1958.

(3) In late September 1960 the Clerk received instructions from Judge Kirkpatrick to ascertain from coun-

sel whether the case would be ready for trial before the first of the year (34a). Within a day or two the Clerk talked to counsel for Glass who stated that he was considering taking further depositions and was soon to confer with co-counsel about the case, and that he was not ready for trial (34a). Again, it was obvious that this case was not among those governed by the Standing Order of May 2, 1958 which calls for the transfer of cases from the ready list to the pool, assignment from the pool to a judge for trial, and that "counsel in cases in the pool at the opening of any trial session must be present, ready for trial" (88a). The routine listing of cases governed by the Standing Order does not depend on whether counsel are prepared to proceed. Accordingly, if the Standing Order was being applied to this case there would have been no occasion for the Clerk's inquiry of counsel as to whether the case could be ready for trial before the first of the year.

(4) Counsel for Glass admitted at the argument held on October 18, 1961 that "his . . . duty . . . [was] . . . 'to watch the progress of the calendar according to the published rule of the Clerk, to wit, look in The Legal Intelligencer . . . which I did" (13b). Since counsel for Glass watched "the progress of the calendar" in The Legal Intelligencer, he observed that

> 1. Although the case was listed as No. 3761 on the 1959-1960 Civil Jury Trial Calendar, the last case to be tried during the 1959-1960 term was No. 418 (34a-35a); and
>
> 2. Although the case was listed as No. 109 on the 1960-1961 Civil Jury Trial Calendar, the last case to be tried during the 1960-1961 term was No. 645 (35a).

Thus, the District Court said:

> ". . . counsel who stated that his office had been following the civil jury trial list could not have helped

seeing that cases with higher numbers than his (meaning that they had been placed on the trial list after his) were being tried—a plain indication that his case was not moving ahead." (77a)

Accordingly, although the District Court observed that counsel for Glass was not aware of the practice followed in the listing for trial of protracted cases, he did know that this case was in a special category and that the Standing Order of May 2, 1958 was not in fact being applied to it. The District Court so found stating that counsel for Glass had "... knowledge that his case was not progressing to trial along with other cases listed on the trial calendar ..." and that he should have realized that "the trial of his case ... [would] in all probability be indefinitely deferred unless he ... [did] something about it" (80a).

In view of the well-supported findings of fact made by the District Court with regard to the general knowledge possessed by Glass' counsel of the consequences of his inaction and with regard to the specific knowledge possessed by Glass' counsel which should have prompted him to action in this case, the decisions of the courts below do not deprive Glass of his property without due process of law.

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8. Any contention that dismissal of Glass' counterclaim because of the inaction of his counsel imposes an unjust burden on Glass has been laid to rest by *Link v. Wabash Railroad Company*, 370 U. S. 626 (1962), where this Court stated at page 633 that "there is certainly no merit to ... [such a] contention ..." and noted that "Clients have been held to be bound by their counsels' inaction in cases in which the inferences of conscious acquiescence have been less supportable than they are here, and when the consequences have been more serious." 370 U. S. 626 at 634 fn. 10. In the present case Glass was fully aware that his counsel was not prosecuting the counterclaim, for in June of 1959 and October 1961 his counsel obtained affidavits from him for use in resisting dismissal of the action for want of prosecution.

B. *The Decisions Below Do Not Violate the Federal Rules of Civil Procedure.*

The second reason assigned by petitioner in support of the writ is that the decisions below violate Rule 40 and Rule 83 of the Federal Rules of Civil Procedure.

Reduced to its simplest terms, Glass' argument based on Rule 40 and Rule 83 is really that the counterclaim could not properly be dismissed for non-compliance with the prevailing practice in the Eastern District of Pennsylvania with regard to protracted cases since that practice had not been reduced to writing.

This argument is invalid because it incorrectly assumes that the counterclaim was dismissed because of non-compliance with the protracted case practice. The inaccuracy of the assumption is shown from the District Court's Opinion dated May 7, 1962. There, the District Court specifically "absolved" counsel for Glass "[. . .] of disregard of . . . [this] established practice of the court" (80a) and based dismissal upon Glass' inaction under all the other attendant circumstances.

Moreover, throughout the proceedings on the motion to dismiss, the District Court emphasized its reliance on the entire history of the case. Thus, in the argument on October 18, 1961 the court referred to the fact that when Bendix's motion to dismiss under Rule 41(b) was denied in 1959 the case had then been pending for 11 years, that thereafter counsel for Glass did nothing for two years more, and that this indicated a disinclination to prosecute (14b). In its Opinion of November 7, 1961 the District Court stated that it was "fully justified in bearing in mind the chronology of this case before the 1959 order in considering whether there is now or ever has been any genuine intention to get this to trial" (78a), and in its Opinion of May 7, 1962 the District Court again stressed that it was relying upon the "entire history of this 14 year old case" (80a).

Accordingly, Glass' argument based on Rule 40 and Rule 83 is inapplicable on the facts. It is also untenable as a matter of law.

The argument appears to rest on the theory that since the practice relating to protracted cases was not in writing it was ineffective as a matter of law under Rule 40 to remove the case from the operation of the Standing Order of May 2, 1958 relating to the call and assignment of cases for jury trial. From this premise Glass seems to contend that he had no obligation to bring the counterclaim to trial. He urges that this result follows whether or not his counsel knew that the Standing Order of May 2, 1958 was not in fact being applied to the case and that the counterclaim would not be tried unless he did something about it.

This argument amounts to nothing more than a contention that a plaintiff with knowledge that his case will not be tried unless he takes affirmative steps to bring it to trial can stand idly by and justify his inaction on the basis of asserted non-compliance by the court with Rule 40. But Rule 40 and Rule 41(b) must be read together. There is nothing in Rule 41(b) which makes it inapplicable upon non-compliance by the court with Rule 40. Rule 41(b) is a codification of the principle established long prior to the adoption of the Federal Rules that every plaintiff has the duty of prosecuting his case. It is to be construed in accordance with Rule 1 so as to ". . . secure the just, speedy and inexpensive determination of every action." To permit the evasion of Rule 41(b) by allowing a plaintiff to thrust upon the court the duty imposed upon plaintiff by that Rule would do violence not only to its language but also to its purpose.

Accordingly, there is no merit in petitioner's argument based on an asserted violation by the District Court of Rule 40 and Rule 83 of the Federal Rules of Civil Procedure.

CONCLUSION.

This case involves nothing more than the exercise of the District Court's discretion to dismiss for want of prosecution a claim which the claimant has permitted to lie dormant for over ten years. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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